J.P. BERTHELSEN v. DIRECTOR GENERAL OF IMMIGRATION, MALAYSIA & ORS.

[S.C. (Salleh Abas L.P., Mohamed Azmi & Abdoolcader S.C. JJ.) November 3 & 11, 1986]

[Kuala Lumpur – Civil Appeal No. 403 of 1986]

Administrative Law – Certiorari – Cancellation of employment pass granted to alien – Whether opportunity to be heard should have been given before cancellation of employment pass – Legitimate expectation – Doctrine of – Natural justice – Plea of national security – Adequate evidence to be given in support – Immigration Regulations, 1963, Reg. 19.

Immigration – Employment pass – Cancellation of employment pass granted to alien – Whether opportunity to be heard should have been given before cancellation – Plea of national security – Evidence.

In this case the appellant a citizen of the United States of America had been granted an employment pass on November 2, 1984 for a period of two years, valid until November 2, 1986, for the purposes of his employment as a staff correspondent of the *Asian Wall Street Journal.* On September 20, 1986 he was served with a notice of cancellation forthwith of the employment pass by the first respondent under regulation 19 of the Immigration Regulations, 1963. The notice of cancellation of the employment pass recited that the first respondent was satisfied that the appellant had contravened or failed to comply with the Immigration Act and the Regulations, that he had failed to comply with the conditions imposed in respect of the pass or the instructions endorsed thereon and his presence in the Federation was or would be prejudicial to the security of the country. The appellant applied to the High Court for leave to apply for an order of certiorari to quash the cancellation of the employment pass and for an order of prohibition against his removal from the country but leave was refused. He appealed.

Held: (1) the appellant was so circumstanced in relation to the action of the first respondent as to be entitled to the observance of the rules of natural justice. Whatever the grounds upon which the first respondent was proceeding, the appellant might in addition to attacking those grounds, also desire to refer to any matters of special hardship which the cancellation of his employment pass would impose upon him and he should have been invited to do so. If having done all this, the first respondent then gives consideration to the appellant's representations, the requirements of natural justice will have been satisfied and it would be for the first respondent to make his decision whether or not to cancel the employment pass in the exercise of the discretion conferred upon him by regulation 19 of the Immigration Regulations;

(2) in this case as the appellant was not afforded an opportunity to be heard before the cancellation of his employment pass, certiorari must go to quash the said cancellation.

Cases referred to:

(1) *Mohamed Nordin bin Johan* v. *Attorney General, Malaysia* [1983] 1 M.L.J. 68.
(2) *Regina* v. *Secretary of State for Home Affairs, Ex parte Hosenball* [1977] 1 W.L.R. 766.
(3) *Schmidt & Anor.* v. *Secretary of State for Home Affairs* [1969] 2 Ch. 149.
(4) *McInnes* v. *Onslow-Fane & Anor.* [1978] 1 W.L.R. 1520.
(5) *Ridge* v. *Baldwin* [1964] A.C. 40.
(6) *Attorney-General of Hong Kong* v. *Ng Yuen Shiu* [1983] 2 A.C. 629.
(7) *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B. (N.S.) 180, 194; 143 E.R. 414, 420.
(8) *Durayappah* v. *Fernando* [1967] 2 A.C. 337.
(9) *Andrew s/o Thamboosamy* v. *Superintendent of Pudu Prison, Kuala Lumpur* [1976] 2 M.L.J. 156.
(10) *Mak Sik Kwong* v. *Minister of Home Affairs, Malaysia (No. 2)* [1975] 2 M.L.J. 175.
(11) *Mak Sik Kwong* v. *Minister of Home Affairs, Malaysia* [1975] 2 M.L.J. 168.
(12) *Council of Civil Service Unions & Ors.* v. *Minister for the Civil Service* [1985] 1 A.C. 374.

SUPREME COURT.

Muhammad Shafee Abdullah (*Arif Yusoff* with him) for the appellant.

T. Selventhiranathan (Senior Federal Counsel) (*Zaleha Zahuri*, Senior Federal Counsel, with him) for the respondents.

Param Cumaraswamy, Dato P.J. Mooney, G.T.S. Sidhu, G. Sri Ram, C.V. Das & T. Thomas on watching brief for The Malaysian Bar.

Cur. Adv. Vult.

Abdoolcader S.C.J. (delivering the Judgment of the Court): The appellant, a citizen of the United States of America, was granted an employment pass on November 2, 1984 for a period of two years – valid until November 2, 1986 – for the purposes of his employment as a staff correspondent attached to the Kuala Lumpur office of the *Asian Wall Street Journal.* On September 26, 1986 he was served with a notice of cancellation forthwith of his employment pass by the first respondent under regulation 19 of the Immigration Regulations, 1963 ('the Regulations') and simultaneously issued with a special pass under regulation 14(3) of the Regulations to remain in the country up to 3.00 p.m. on September 28, 1986 for the purpose of making arrangements to leave the country within forty eight hours of service, but the stipulated deadline was subsequently extended to midnight on October 1, 1986. The notice of cancellation of the employment pass recited that the first respondent was satisfied that the appellant had contravened or failed to comply with the Immigration Act, 1959-1963 and the Regulations, that he had failed to comply with the conditions imposed in respect of that pass or the

instructions endorsed thereon, and his presence in the Federation was or would be prejudicial to the security of the country.

The appellant then immediately took steps to apply to the High Court for leave to apply for an order of certiorari to quash the cancellation of his employment pass and for an order of prohibition against his removal from the country. Harun Hashim J. after a hearing *inter partes* on October 1, 1986 refused to grant him leave solely on the ground that as one of the reasons for the cancellation of the employment pass involved the matter of national security it would be an exercise in futility to grant leave since, as he put it, in such a case 'a Court should not go behind the decision (of the executive)'. The appellant left the country that very day and an appeal was lodged on his behalf against the rejection of his application for leave.

At the outset of the hearing of the appeal before us we were of the view *ex facie* that leave should in fact have been granted in the court below as the point taken by the appellant was not frivolous to merit refusal of leave *in limine* and justified argument on a substantive motion for certiorari. We accordingly applied and followed the procedure adopted by the Federal Court in *Mohamed Nordin bin Johan* v. *Attorney General, Malaysia*[1] (at page 70) and allowed the appeal, and granted leave to the appellant to apply for an order of certiorari. We then turned to a consideration of the substantive motion for certiorari on an undertaking by counsel for the appellant to formally file this in the registry.

We asked Mr. Selventhiranathan, Senior Federal Counsel appearing for the respondents, to address us in the first instance on one point only, *scilicet,* whether the appellant should have been afforded an opportunity to be heard before the cancellation of his employment pass. He was unable to give any effective answer to this question and merely referred to *Regina* v. *Secretary of State for Home Affairs, Ex parte Hosenball*[2] to which we will presently advert, but there an opportunity had in fact been given for representations to be made, and when we pointed this out to him, he was unable to take the matter further and said he had nothing to add.

The Court of Appeal in England held in *Schmidt and Another* v. *Secretary of State for Home Affairs*[3] that no duty existed to give an alien an opportunity of being heard before a decision was made refusing an application for an extension of permission to remain in the United Kingdom. Lord Denning M.R. emphasised that the alien had 'no right' and 'no legitimate expectation' of being allowed to stay. However, he also said that the alien had not been treated unfairly since he had had an opportunity of making representations. Lord Denning describes (at page 170) an administrative body as being bound, in proper cases, to give a person affected by its decision an opportunity of making representations if, although lacking any right or interest, that person yet possesses 'some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.' By way of illustration he contrasts the case of an alien whose residence permit has expired with that of another whose permit is revoked before its expiry date; the latter possesses a legitimate expectation of being allowed to stay for the full term of the permit, and he alone has, in consequence, a legal right, in accordance with the principles of natural justice, to insist that his representations be considered before the making of any decision upon his deportation.

Two passages from Lord Denning's judgment are particularly in point. In the first (again at page 170), he points to the role played by the possession of a legitimate expectation:

> "The speeches in *Ridge* v. *Baldwin* [1964] A.C. 40 show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say."

Then, (at page 171), he indicates how this is to be applied in the case of an alien. He says of such a person:

> "He has no right to enter this country except by leave: and, if he is given leave to come for a limited period, he has no right to stay for a day longer than the permitted time. If his permit is revoked *before* the time limit expires, he ought, I think, to be given an opportunity of making representations: for he would have a legitimate expectation of being allowed to stay for the permitted time. Except in such a case, a foreign alien has no right – and, I would add, no legitimate expectation – of being allowed to stay. He can be refused without reasons given and without a hearing."

The emphasis we have laid on the word 'before' merely reproduces and reflects its underscoring in the report itself in italicized print. A petition for leave to appeal against this decision was dismissed by the Appeal Committee of the House of Lords: [1969] 2 Ch. 174.

In *McInnes* v. *Onslow-Fane & Another*[4] which involved the refusal of a boxers' manager's licence to the plaintiff by the British Boxing Board of Control without having given him an oral hearing or any reasons for their refusal, Megarry V.-C. said (at pages 1528-1529) that where the court is entitled to intervene, the type of decision in question must be considered. He did not suggest that there is any clear or exhaustive classification but thought that at least three categories may be discerned. First, there are what may be called the forfeiture cases where there is a decision which takes away some existing right or position, as where a member of an organisation is expelled or a licence is revoked. Second, at the other extreme there are what may be called the application cases where the decision merely refuses to grant the applicant the right or position that he seeks, such as membership of the organisation, or a licence to do certain acts. Third, there is an intermediate category, which he termed the expectation cases, which differ from the application cases only in that the applicant has some legitimate expectation from what has already happened that his application will be granted. This head includes cases where an existing licence-holder applies for a renewal of his licence, or a person already elected or appointed to some position seeks confirmation from some confirming authority. He went on to say that it seems plain that there is a substantial distinction between the forfeiture cases and the application cases, as in the former there is a threat to take something away for some reason, and in such cases the right to notice of the charges and the right to be heard in answer to the charges [which in *Ridge* v. *Baldwin*[5] (at page 132) Lord Hodson said were three features of natural justice which stood out] are plainly apt. It will therefore be seen that when there is a revocation or cancellation or forfeiture of a subsisting position, the right to be heard in answer to the charges preferred is a concomitant adjunct to the exercise or implementation of the contemplated action.

The doctrine of legitimate expectation has recently been lucidly expounded and explained by the Privy Council in *Attorney-General of Hong Kong* v. *Ng Yuen Shiu*[6] and Lord Fraser of Tullybelton in delivering the judgment of the Board said (at page 636):

"Accordingly 'legitimate expectations' in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis: see *Reg.* v. *Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 Q.B. 864. So it was held in *Reg.* v. *Board of Visitors of Hull Prison, Ex parte St. Germain (No. 2)* [1979] 1 W.L.R. 1041 that a prisoner is entitled to challenge, by judicial review, a decision by a prison board of visitors, awarding him loss of remission of sentence, although he has no legal right to remission, but only a reasonable expectation of receiving it."

To repeat the well-known words of Byles J. in *Cooper* v. *Wandsworth Board of Works*[7]:

"although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature."

In *Durayappah* v. *Fernando*[8] Lord Upjohn, delivering the reasons of the Privy Council, in considering the application of the principle of *audi alteram partem*, said (at page 349) that it would be wrong to attempt to give an exhaustive classification of the cases where the principle should be applied, and observed that 'no general rule can be laid down as to the application of the general principle *in addition to the language of the provision.*' He went on to state that there are three matters which must always be borne in mind in considering whether the principle should be applied or not, and that they were (a) the nature of the property, the office held, the status enjoyed or the services to be performed by the complainant of injustice; (b) in what circumstances or upon what occasions was the person claiming to be entitled to exercise the measure of control entitled to intervene; and (c) upon proving the right to intervene what sanctions in fact was the latter entitled to impose on the complainant, and it was only upon a consideration of all these matters that the question of the application of the principle could properly be determined. We should perhaps add that there may of course be other matters that would be relevant in deciding whether the principle applies: for example, the nature of the body in which the power is vested, the language in which the power is conferred, and the presence in the relevant legislation of provisions enabling the exercise of the power to be reviewed.

Whilst this judgment was in the course of going to print, Senior Federal Counsel wrote in to the registry to draw our attention to *Andrew s/o Thamboosamy* v. *Superintendent of Pudu Prison, Kuala Lumpur*[9] which he thought pertinent to this matter, as the Federal Court decided *inter alia* in that case that as the Immigration Ordinance, 1959 did not give a right to a hearing before an order of detention is issued, the appellant there had no such right, implied or otherwise. In *Andrew*, with which we are by no means in-

conversant, the appellant had renounced his citizenship and returned to India but subsequently unlawfully re-entered the Federation without a pass as required by section 6(1)(c) of the Immigration Ordinance, 1959. Orders of removal and detention were accordingly made against him under the provisions of the Ordinance and the appellant who was still under detention some ten months later then applied for an order of *habeas corpus* on the basis that his detention was illegal or improper.

In *Andrew* the detainee was an alien who had unlawfully entered the country in breach of the immigration laws and was no less than an illegal immigrant – a designation much in vogue these days to connote a pesky and pernicious epiphenomenon of transnational beachcombing. He had no right to be here and the order of detention was made against him consequent to an order of removal from the Federation in the first instance in accordance with the relevant statutory provisions. He certainly did not have any right in those circumstances to be entitled to a hearing before the order of detention was made, and a logical extention of any contention to the contrary would on a *reductio ad absurdum* result in every criminal being entitled to be heard before he can be arrested!

The position in the present appeal is wholly different: the appellant was lawfully in the country under the sanction of an employment pass validly issued for a stipulated period, and he clearly had a legitimate expectation to be entitled to remain in this country at least until the expiry of the prescribed duration, and any action to curtail that expectation would in law attract the application of the rules of natural justice requiring that he be given an opportunity of making whatever representations he thought necessary in the circumstances. The two situations are poles apart, and the suggestion of the relevance of *Andrew* to the matter before us only serves to illustrate the inherent perils blind reference to authority enshrouds when resorted to without a proper appreciation of the vital considerations involved in the decision in question. The principles enunciated in *Durayappah* which we have adverted to make the position plain.

We should perhaps now revert to *Ex parte Hosenball* which we mentioned earlier. In that case, the applicant, a United States citizen working as a journalist in London, was informed by letter by the Home Office that the Secretary of State had decided in the interests of national security to make a deportation order against him under the Immigration Act and that he could, if he wished, make representations to an independent advisory panel, and a Home Office statement accompanying the letter referred to information considered by the Secretary of State that the applicant had sought and obtained for publication information harmful to the security of the United Kingdom including information prejudicial to the safety of servants of the Crown. The applicant's solicitors requested particulars of what was alleged against him but this was refused. The Court of Appeal held that where national security was involved the ordinary principles of natural justice were modified for the protection of the realm and that public policy required the preservation of confidentiality for security information, and accordingly the Secretary of State who had given the matter his personal consideration need not disclose the information he had to the applicant.

Indeed on this aspect of security Abdoolcader J. had held in the High Court at Ipoh some two years earlier in *Mak Sik Kwong* v. *Minister of Home Affairs, Malaysia (No. 2)*[10] (at page 182) that for the purposes of the exercise of his powers in making an order of deprivation of citizenship under article 24(2) of the Constitution of Malaysia it is open to the Minister of Home Affairs to take into consideration relevant confidential information such as intelligence reports and the like without disclosure to the citizen where such disclosure would be prejudicial to the public or national interest. This aspect however did not detract from the fact that in the matter of deprivation of citizenship the Constitution does indeed provide by article 27 a scheme for the oblique application of the rules of natural justice and the concepts of fairness and impartiality [*Mak Sik Kwong* v. *Minister of Home Affairs, Malaysia*[11] (at page 174); *Mak Sik Kwong (No. 2)* (at page 181)]. So too in *Ex parte Hosenball* where the applicant in that case had in fact been invited to make representations and which he did at a hearing before an independent advisory panel. The Court of Appeal only upheld the refusal of the Secretary of State to provide the particulars sought on the ground of national security, and indeed Lord Denning M.R. did suggest (at page 781) that the court might interfere if the advisers refused to hear any representations.

We turn now to a consideration of the decision of the House of Lords in *Council of Civil Service Unions & Others* v. *Minister for the Civil Service.*[12] The main functions of Government Communication Headquarters ('GCHQ') involved

the handling of secret information vital to national security, and staff employed there had been permitted to belong to national trade unions, and most had done so. There was a well-established practice of consultation between the official and trade union sides about important alterations in the terms and conditions of service of the staff. On December 22, 1983, the Minister gave an instruction that with immediate effect the staff would no longer be permitted to belong to national trade unions. There had been no consultation with the trade unions or with the staff at GCHQ prior to the issuing of that instruction. The applicants, a trade union and six individuals, sought judicial review of the Minister's instruction on the ground that she had been under a duty to act fairly by consulting those concerned before issuing it. In an affidavit, the Secretary to the Cabinet deposed to disruptive industrial action in support of national trade unions that had taken place at GCHQ as part of a national campaign by the unions designed to damage government agencies and that it had been considered that prior consultation about the Minister's instruction would have involved a risk of precipitating further disruption and would moreover have indicated vulnerable areas of GCHQ's operations. The House of Lords held that the applicants would, apart from considerations of national security, have had a legitimate expectation that unions and employees would be consulted before the Minister issued her instruction of December 22, 1983 but the evidence established that the Minister had considered, with reason, that prior consultation about her instruction would have involved a risk of precipitating disruption at GCHQ and revealing vulnerable areas of operation, and, accordingly, she had shown that her decision had in fact been based on considerations of national security that outweighed the applicants' legitimate expectation of prior consultation.

In the matter of the apprehended disruption in that case in the event there was prior consultation, we would, to illustrate, in particular point to the evidence referred to in the judgment of Lord Fraser of Tullybelton (at page 396) that when an official of GCHQ had sought to explain to the general secretary of one of the trade unions the serious consequences that might follow from disruption of certain parts of GCHQ work, the answer was 'Thank you. You are telling me where I am hurting Mrs. Thatcher the most.' So in that case there was ample and substantial evidence to support the Minister's instruction without prior consultation and every justification for that course of action as any prior consultation would have resulted in disruption in a vital security installation and seriously affected national security. The position is wholly different in the matter of the instant appeal: we are unable to envisage what dire consequences of catastrophic magnitude would or possibly could have ensued if the appellant had been accorded a right to make representations prior to the contemplated exercise of the power to cancel his employment pass; all that need be given was an opportunity to the appellant to make representations and the question of security would only arise in the event that he sought particulars of the allegations that his presence in the Federation was or would be prejudicial to the security of the country, as in *Ex parte Hosenball.* We would add that in any event adequate evidence from responsible and authoritative sources would be necessary on the security aspect and no reliance can be placed in that regard on a mere *ipse dixit* of the first respondent to that effect in the notice of cancellation of the employment pass which the learned Judge purported to accept without more ado.

In the light of the authorities we have adumbrated, we regard the appellant as so circumstanced in relation to the action of the first respondent as to be entitled to the observance of the rules of natural justice. Whatever the grounds be upon which the first respondent was proceeding, the appellant might, in addition to attacking those grounds, also desire to refer to any matters of special hardship which the cancellation of his employment pass would impose upon him and he should have been invited to do so. If, having done all this, the first respondent then gives consideration to the appellant's representations, the requirements of natural justice will have been satisfied and it would be for the first respondent to make his decision whether or not to cancel the employment pass in the exercise of the discretion conferred upon him by regulation 19 of the Regulations.

In the event, at the conclusion of the hearing it was clear that certiorari must go to quash the cancellation of the appellant's employment pass, and we ordered accordingly. We awarded costs here and below to the appellant and directed the deposit lodged in court by way of security to be paid out to him.

Order accordingly.

Solicitors: *Shafee & Co.*